

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

ELIZABETH DENIKE

§

v.

§

CIVIL ACTION NO.
SA-2011-CV-1091 XR

XEROX CORPORATION

§

**PLAINTIFF'S MOTION FOR LEAVE TO FILE SUR-REPLY TO
DEFENDANT'S REPLY
RE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Plaintiff, Elizabeth Denike, submits this, her Motion for Leave to File Sur-Reply to Defendant's Reply Regarding Defendant's Motion for Summary Judgment, and show as follows:

1. The Defendant filed its Motion for Summary Judgment on March 29, 2013. After receiving leave to file late, Plaintiff filed her Response on April 18, 2013. After receiving leave to file late, the employer filed its Reply brief on May 2, 2013. In its Reply, the employer has raised new arguments regarding retaliation and direct evidence. The employer argues that Ms. Denike's earlier complaint about discrimination in 2000 or 2001 is too old to support an inference of retaliation. It also argues that a phone call by Ron Haney the day before the Sept. 17, 2008 Memo cannot serve as direct evidence. These arguments were not raised in the initial motion for summary judgment.

2. A party should not be allowed to raise a new issue in its reply brief. It is well established in most circuits that have addressed the issue that parties may not raise new issue in a reply brief. See, e.g., *Northwest Appliance Corp. v. Lynwood Equipment, Inc.*, 841 F.2d 918, 924 (9th Cir. 1988) (On appeal, a party may not raise a new issue in its reply brief); *Beaird v. Seagate Technology, Inc.*, 145 F.3d 1159, 1164-65 (10th Cir. 1998) (A court may allow new evidence or a new issue in a reply brief if the court either 1) does not rely on the new evidence or issue in ruling on summary judgment, or 2) it allows the opposing party to file a sur-reply); *Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546, 553 (6th Cir. 2008) (A movant which raises a new issue in its reply brief on summary judgment

waives that issue on appeal); *MBI Group Inc. v. Credit Foncier Du Cameroun*, 616 F.3d 568 (D.C. Cir. 2010) (District courts, like courts of appeals, should generally deem arguments made only in the reply brief to be forfeited); *G.C. ex. Rel. Johnson v. Wyndham Hotel & Resorts*, 829 F.Supp.2d 609, 614 (M.D. Tenn. 2011) (Arguments raised for the first time in reply brief generally should not be considered because non-moving party has no opportunity to address them). The Defendant should not be allowed to offer new arguments without allowing Plaintiff to submit briefing on the issues.

3. Western District Local Rule Cv-7(f) provides that leave of court is necessary before filing a sur-reply. But, this is summary judgment. A more complete briefing of the issues will assist the Court. And, of course, granting summary judgment would deny the plaintiff her day in court.

Conference

1. Plaintiff has conferred with the employer regarding this motion. Defendant has indicated its opposition to any additional briefing.

WHEREFORE, Plaintiff prays that the attached Sur-Reply be filed; and for all relief, at law and in equity, to which she may justly be entitled.

Respectfully submitted,



Thomas J. Crane
T.S.B. No. 05007320

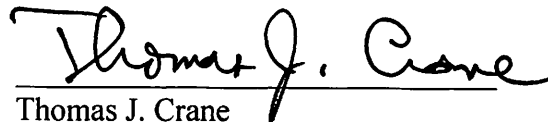
LAW OFFICE OF THOMAS J. CRANE
750 E. Mulberry, Suite 303
San Antonio, Texas 78212
(210) 736-1110
(210) 745-4258 Fax
tom@craNELawyer.net

Attorney for Plaintiff

Certificate of Service

I certify that a true copy of the foregoing instrument was electronically filed on the 7th day of May, 2013 with the Clerk of Court using the CM/ECF system which will send notice of such filing to the following counsel:

Shannon Schmoyer
Schmoyer Reinhard LLP
3619 Paesanos Parkway, Suite 202
San Antonio, Texas 78231



Thomas J. Crane

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

ELIZABETH DENIKE

§

v.

§

CIVIL ACTION NO.
SA-2011-CV-1091 XR

XEROX CORPORATION

§

ORDER

On this day came to be heard the Plaintiff's Motion for Leave to Submit Sur-Reply to Defendant's Reply. Having heard argument of counsel and reviewed the motion and attachments, it appears that the motion has merit.

It is therefore:

ORDERED that the Plaintiff's Sur-Reply, as attached to Plaintiff's Motion for Leave be promptly filed in this cause.

SIGNED AND ENTERED this ____ day of _____, 2013.

XAVIER RODRIGUEZ
U.S. DISTRICT JUDGE